[In THE CONSISTORY COURT OF ROCHESTER.]
In RE PLUMSTEAD BURIAL GROUND.
16 March 1895

[In The Consistory Court of Chichester.]
The Vicar And Churchwardens of St. Andrew's, Hove, and The Hove Commissioners v. Mawn and Rowe And Others Cited.
August 1894

A corrected text version, with some notes,
of the above.

by

E C G

What follows is a corrected text, with some notes,
of the Consistory Court Judgments in:

In RE PLUMSTEAD BURIAL GROUND

&

[As appendix 1]

The Vicar And Churchwardens of St. Andrew's, Hove, etc
v. Mawn and Rowe and Others.

Reported in
The Law Reports of the
OF THE INCORPORATED COUNCIL OF LAW REPORTING
Probate Division 1895

In addition Appendix 2 is Section 5 "Churchyard (s)" from The Ecclesiastical Law of The Church Of England Vol 2 [1895] by Sir Robert Phillimore, Sir Walter George Frank Phillimore & Charles Fuhr Jemmett

My aim has been to provide an easy to read and informative production which may be of help to fellow researchers and others who have an interest in the subject.

I have also added some biographical notes of the people involved.

Eric Graham
stockbridgehistory@hotmail.com

Original page numbers are shown in square brackets [].

There are no page numbers for 'St Andrew's'.

Original footnote numbers for 'Plumstead' as shown bracketed thus ( ) and also Appendix 3 [letters].

In St Andrews original footnotes are **fully** bracketed, thus ( ).

[In THE CONSISTORY COURT OF ROCHESTER.]
In RE PLUMSTEAD BURIAL GROUND.
16 March 1895

Ecclesiastical Law — Faculty — Addition to Churchyard — Burial Act, 1852 (15 & 16 Vict. c. 85), s. 44 — Consecrated Ground — Want of Jurisdiction to sanction Conversion to Secular Use.

The vicar and churchwardens of a parish church in the diocese of Rochester petitioned the Ordinary to decree a faculty to authorize a strip of consecrated ground, added to the churchyard under the Burial Act, 1852, but in which burials were prohibited by Secretary of State's order, being taken therefrom and made part of an adjoining public highway for the purpose of widening the same.

In their petition they alleged (inter alia) that no interments had ever been made within the portion of the churchyard proposed to be so dealt with by the faculty; that inconvenience was caused to persons attending the church from there being no pathway on the side of the highway adjacent to the churchyard; and that the proposed widening would enable such a pathway to be made, and would greatly conduce to the convenience of those attending the church as well as of the general public. The citation to lead the faculty was by order moved for in Court.

On the hearing of the motion the Chancellor of the Diocese of Rochester, being of opinion that by granting the faculty prayed for he would be authorizing the appropriation of consecrated ground to secular uses, thus entertaining a cause beyond the jurisdiction of the Court, refused the motion.

On the 12th of February last the Rev. James Adair McAllister,[1] vicar of the parish of Plumstead, in the county of Kent and diocese of Rochester, and William Trump and John Thomas Taylor,[2] the churchwardens of the same parish, presented a petition whereby they prayed the Court to decree a faculty to issue to authorize a strip of land, forming part of an additional burial ground added to the parish churchyard, and shewn on a plan annexed to the petition, being taken from the said burial ground and converted into roadway, so as to cause the roadway running along the southern boundary of the churchyard to be forty feet in width from the opposite kerb, as shewn on the said plan.
[226]

1 B. Ireland. Deaths Mar 1895 McAllister James Adair Age 78 Woolwich 1d p1029 Estate £815 16s 1d. - ECG
2 Deaths Mar 1908 d. 28 Mar] Taylor John Thomas Age 76 Woolwich 1d p791 Butcher. Estate: £6,644 8s 3d. - ECG

The petition as presented alleged in substance as follows: —

> "In the year 1860 the piece of land shewn on the plan annexed hereto was conveyed to the Ecclesiastical Commissioners, for England, and was added to the churchyard of the parish of Plumstead pursuant to 15 & 16 Vict. c. 85, and the said piece of land was duly consecrated as an additional burial ground for the said parish. In accordance with 15 & 16 Vict. c. 85, s. 44,[3] one of Her Majesty's principal Secretaries of State on February 10, 1891, made the following regulation:
>
> No grave shall be made within five yards of the southern boundary of the said burial ground. On August 28, 1893, an order was made by one of Her Majesty's Secretaries of State to the effect that no vaults or earthen graves shall be made within twenty yards of the southern boundary of the said burial ground. The Home Secretary, by the said order of August 28, 1893 has required that the said burial ground shall be effectively fenced. The vicar and churchwardens have no funds for such purpose. The vestry of the said parish (under the Metropolitan Management Act, 1855) are prepared in the event of the said strip of land being converted into roadway, as before stated, properly to fence the whole of the said additional burial ground except where it adjoins the old churchyard."

An intimation having been received from the registrar that the citation in the cause must be applied for after argument in Court, counsel, on behalf of the petitioners, now moved the Chancellor of the Diocese of Rochester (Lewis T. Dibdin, Esq.[4]) to decree the usual citation with intimation to issue;[5] the following additional allegations having been by leave of the Court inserted by way of amendment in the petition during the hearing of the motion: —

> "The roadway running along the southern boundary of the [227] said churchyard is inconveniently narrow, and it is desired to take a strip of the said burial ground where burials cannot take place about ten or twelve feet in width and throw it into the roadway thereby causing the roadway to be forty feet in width from the opposite kerb, as shewn in the said plan. There is no pathway on the south side of the said churchyard; and the road to the south of the said churchyard is not lighted on the north side. Inconvenience is thereby caused to persons attending the said church, and the proposed widening of the road will enable a pathway to be made to the south of the said churchyard, and will greatly conduce to the convenience of those

3 (1) The 15 & 16 Vict. c. 85, s. 44, is as follows: —
" It shall be lawful for one of Her Majesty's principal Secretaries of State from time to time to make such regulations in relation to the burial grounds .... which may be provided under this Act as to him may seem proper, for the protection of the public health and the maintenance of public decency, and the burial boards and all other persons having the care of such burial grounds . . . shall conform to and obey such regulations."

4 Sir Lewis Tonna Dibdin KC: ecclesiastical lawyer and Dean of the Arches.
Births Sep 1852 Dibdin Lewis [b. 19 Jul] St Giles 1b p291 Marriages Jun 1881 DIBDIN Lewis Tonna Exeter 5b p167
Deaths Jun 1938 [d. 12 Jun] DIBDIN Lewis T Age 85 Surrey S.E. 2a p571 Estate £27,808 1s 1d - ECG

5 (2) The Court sat in the vestry house of St. Saviour's, Southwark.

attending the said church as well as of the general public. No interments have been made within the strip of land proposed to be thrown into the road."

Boxall,[6] for the petitioners, in support of the motion. Assuming the allegations of fact in the amended petition to be taken as proved for the purposes of the present motion, it is clear that, if the faculty asked for is granted, the conversion of the piece of land referred to in the petition into roadway will not be the use of consecrated ground for mere secular purposes, but that it has an ecclesiastical object, and will be for the substantial benefit of the congregation attending the parish church of Plumstead both with respect to the pathway there mentioned, and to the new fence to be provided at the expense of the ratepayers. The grant of the faculty is therefore in the discretion of the Court, and the citation ought to issue.

On many occasions, in other dioceses than that of Rochester, faculties have been granted in similar cases. Indeed, it has been the practice for the last twenty-five years to grant faculties of this nature in the diocese of London, in the case of churchyards where burials are no longer allowed, and in *The Vicar and Churchwardens of St. Botolph v. Parishioners of the Same*[7], Dr. Tristram,[8] the chancellor of that diocese, shews how the practice of granting such faculties originated, and decided that an Ecclesiastical Court has jurisdiction to grant them where in the discretion of the Ordinary, exercised with regard to the changed circumstances [228] of the present day, he is of opinion that the appropriation asked for will be for the benefit of both the parishioners and the public. Subsequently a further decision on the same point made in the same Court in *In re St. Nicolas Cole Abbey*,[9] The following are instances in other dioceses than that of London where faculties have been granted for widening adjacent public streets. On August 20, 1891, the Chancellor of the Diocese of Worcester, J. S. Dugdale, Esq., Q.C.,[10] granted an unopposed faculty authorizing the

6 Boxall, William Percival Gratwicke, M.A., Emmanuel Coll., Camb,, 1874, a member of the South-eastern circuit, a student of Lincoln's Inn 22 April, 1870(then aged 21), called to the bar 30 April, 1873 (eldest son of William Percival Boxall, Esq., of Brighton). Address: Hare Court, Temple, E.C.; Oxford and Cambridge Club. Births Jun 1848 Boxall William Percival Gratwicke Brighton 7 p297 Marriages Sep 1886 Boxall William Percival G London C. 1c p19. Deaths Dec 1931 Boxall William P G Age 82 Steyning 2b p377.
BOX ALL William Percival Gratwlcke of 15 First-avenue Hove Sussex died 5 December 1931 Probate London 24 February to Sir Alleyne Perciyal Boxall baronet and Ernest Harper Kempe solicitor. Effects £51226 12s. 6d. Resworn £51388 12s. 6d. - ECG

7 (1) [1892] P. 161.

8 Thomas Hutchinson Tristram, Q.C., D.C.L., Lincoln Coll., Oxon, 1854 (Crewian exhibitioner 1843, Boden Sanscrit univ. scholar1848, B.C.L. 1850). B. 25 Sep 1825 Married 26 Oct., 1861, Flora, younger dau. of Very Rev. Thomas John de Burgh, M. A., of Oldtown, Co. Kildare. Deaths Mar 1912 [d. 8 Mar] Tristram Thomas H Age 86 Kingston 2a p643. Estate: £1,901 16s 8d. Practice: probate, matrimonial, and admiralty divisions and ecclesiastical courts. Judge of the consistory court of London, chancellor of the dioceses of Hereford and Ripon, commissary general of the diocese of Canterbury. Younger son of late Rev. Henry Baker Tristram, M.A., vicar of Egglingham, Northumberland. Address: Dalton Hill, Albury, Guildford ; Queen Anne's Mansions, St. James' Park, S.W.; 12, King's Bench Walk, Temple, E.C. - ECG

9 (1) [1893] P 58.

10 John Stratford Dugdale, Q.C 1882, B.A., Merton Coll., Oxon, 1857, from Eton: student of Lincoln's Inn 5 Nov., 1859, went to the Inner Temple 28 Apr 1862 (then aged 26), where he was called to the bar 11 June, 1862: Q.C 16 Dec., 1882. Member of the Midland circuit, recorder of Birmingham 1877, of Grantham 1874-7, J.P. co. Warwick,

vicar and churchwardens of Great Malvern parish church to appropriate a portion of the parish churchyard for such a purpose, the vicar and churchwardens having made a declaration that to their knowledge no interments of remains had taken place in the portion of the church proposed to be thrown into the roadway;[11] and recently two similar faculties have been granted by Dr. Tristram in the Consistory Court of Chichester, one on August 17, 1894, in the case of *St. Mary-in-the Castle, Hastings*[12], and the other on November 7, 1894, in the case of *Vicar and Churchwardens of St. Andrews, Hove, and the Hove Commissioners v. Mawn and Rowe and Others cited*.[13] In the latter case the issue of the faculty asked for was opposed, and the older cases containing dicta adverse to the proposition that consecrated ground can legally be devoted to secular uses were referred to.[14] Of these the principal ones [229] appear to be the following: *The Rector and Churchwardens of St. Johns, Walbrook v. The Parishioners thereof and Others*,[15] *Harper* [230] *v. Forbes*,[16] and *Reg. v. Twiss*;[17] but none of them are, it is submitted, of any binding authority in the present case, where [231] the Court is asked to sanction the appropriation, not of consecrated ground in which interments can lawfully take place, but [232] of consecrated ground in which, at no time has there been even one interment. In the *St. Johns*, [233] *Walbrook Case*,[18] where Dr. Lushington,[19] sitting in the Consistory Court of London, did refuse to grant a faculty for turning a strip of the churchyard into the adjoining highway, it is clear, both from the terms of the application and the evidence that the churchyard was still used for burials; and such must have been the case in the earlier precedent referred to by Dr. Lushington as having happened in Sir William Wynne's time.[20] In *Reg. v. Twiss*[21] the faculty, the granting of which it was sought to prohibit, was a confirmatory faculty for works already done, and the prohibition was refused on grounds immaterial to the present case; whilst in *Harper v. Forbes*[22], not only was it proved that remains had been disturbed, but the only point really decided was that it was an unlawful act to interfere with a churchyard without the sanction of a faculty. [He also referred to In re Bettison;[23] In re St. George-in-the East[24]]

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chairman of quarter sessions 1883, author of Punishments and Conviction at Quarter Sessions (2nd son of William Stratford Dugdale, Esq., of Merevale Hall, co. Warwick) ; born 30 July, 1835. Married Dec 1890 qtr. Deaths Dec 1920 Dugdale John S Age 85 Warwick 6d p786. Estate £151,149 6s 6d. Address: 7A, Mount Street, Grosvenor Square, W.; Paper Buildings, Temple, E.C.; Clubs: Carlton and Oxford & Cambridge - ECG

11 (2) Not reported.

12 (3) See *The Hastings and St. Leonards News* of August 17, 1894.

13 This very long footnote can be found as Appendix 1 - ECG

14 See f/n 11

15 (1) 2 Roberts. 515; 16 Jur. 645.

16 (1) 5 Jur. (N.S.) 275.

17 (2) L. R. 4 Q. B. 407.

18 (1) 2 Roberts. 515; 16 Jur. 645.

19 Stephen Lushington b. 14 Jan 1782 Deaths Mar 1873 [d. 19 Jan] Lushington Stephen Age 91 Guildford 2a p37. Estate: "under" £100,000. See Oxford D N B entry.- ECG

20 b. 1729 d. 1815 Judge and academic. Dean of the Arches 1788 to 1809 - ECG

21 (2) L. R. 4 Q. B. 407.

22 (3) 5 Jur. (N.S.) 275.

23 (4) L. R. 4 A. & E. 294.

24 (5) 1 P. D. 311.

The Chancellor. This is a motion by which I am asked to issue citation on a petition of the vicar and churchwardens of the parish of Plumstead, in the diocese of Rochester, for a faculty to permit a strip of the churchyard of the parish to be thrown into the public highway running outside the churchyard. I felt doubt as to the jurisdiction of this Court to grant such a faculty, and therefore desired the citation to be moved for in Court in order that I might have the advantage of hearing counsel on the point. The practice of the Ecclesiastical Courts is to determine a question of this sort on a motion for citation, rather than at a later stage, so as to prevent unnecessary expense and delay, and, in case of the Court deciding against the petitioners, to give them the earliest opportunity of appealing if they think fit to do so.

The actual question for decision is whether this Court can [234] grant a faculty for the purpose of authorizing the use of a portion of a consecrated churchyard as a highway. If I have jurisdiction to grant such a faculty, I conceive that I ought to issue citation. The question would then be whether I ought in this case to exercise that jurisdiction; and that question can most conveniently be decided when the facts are fully before the Court at the hearing. But if I have no jurisdiction to grant such a faculty, I ought to refuse citation.

Consecrated ground is ground separated and set apart from all common, profane, and secular uses whatever and dedicated to ecclesiastical purposes for ever by the definitive sentence of the Spiritual Court, which according to English law has jurisdiction, with the consent of the owner of the land consecrated, to issue such a sentence. A definitive sentence is final, and cannot be revoked or recalled even by the authority which promulgated it. From very early times ground once consecrated has been held to be permanently subject to the conditions imposed by the sentence of consecration. It cannot be used for any secular purpose, and the preservation of its sacred character is placed under the protection of the ecclesiastical authorities. So well recognised and enduring are the disabilities of consecrated ground, that where it becomes necessary to use the site of a church or a churchyard for secular purposes an Act of Parliament is requisite. Many such Acts exist.

These observations relating to all consecrated ground are, of course, applicable to a consecrated churchyard. It can only be used for ecclesiastical purposes. Its primary and chief uses are

(1.) as a burial-place, and generally

(2.) as a garth[25] surrounding and providing access to the parish church. I shall have occasion to mention presently, when I deal with the authorities, that there are many other uses to which land in a churchyard may be legitimately put

25 An open space surrounded by cloisters. - ECG

without desecration.

Paths or roadways are necessary to a churchyard

(1) as a means of access to the church, and

(2) as a means of access to the different portions of the churchyard and the graves therein.

The Ordinary, in whom, as I have said, is vested the care of churchyards, has power by faculty to arrange and alter such paths and roadways so as to make them answer their proper [235] purposes. That is a mere matter of internal management. The Ordinary is the regular authority to determine how the ground can be used to the best advantage for the purposes stamped on burial it by law, and, so far as the Ordinary is concerned, indelibly stamped on it.

Many churchyards are traversed by public footpaths which neither provide access to the church nor are useful for access to graves, but which nevertheless are legal footpaths existing by prescriptive right, and incapable of being interfered with by the Ordinary. How such paths when not church ways (that is, ways leading to church) originated it is not always possible to say. Sometimes, perhaps, the footpath was there before the churchyard; but, however that may be, I take it that all paths of this sort, neither beginning nor ending in the churchyard, but merely crossing it as if it were a field, so far as they have a legal origin, are prescriptive. I am not aware of any authority except certain modern dicta for the grant of a faculty for such a footpath; and it seems to me that unless the footpath is needed in connection with the use of the church or churchyard for their proper ecclesiastical purposes, it would be an application of part of the churchyard to a secular, and therefore an unauthorized, purpose.

The same observation applies with even greater force to a proposal to throw a strip of the churchyard into a high road so as to widen it, and with that object to alter the boundaries of the churchyard. It is a direct application of consecrated ground to a secular purpose, and, as it seems to me, equally so whether the freehold is purported to be given up, or only the right of user of the land as part of a highway. I do not think an attempt to retain on paper, as it were, the Ordinary's jurisdiction over the land after it has been turned into the highway can affect the substance of the transaction, which is the user[26] of the land for a secular purpose. Nor can I attach weight to the argument put forward in this case by the amendment now made of the petition (it was not in the petition originally) that, as the widening of the highway will be convenient to the parishioners attending church, as well as to the rest of the Queen's subjects using the highway, therefore the alienation of a portion of the churchyard, [236] and a

26 *[sic]* - ECG

consequent alteration of boundary walls so as to put this portion outside the churchyard, are defensible as an application of consecrated ground to ecclesiastical purposes. The road to be widened is at a considerable distance from the church, and does not lead directly to it, and there is no entrance to the churchyard from the road to be widened. The Court must look at the substance of the matter rather than its accidents, and where the main feature of the scheme is the widening of a high road, the proposal must be justified, if at all, as a proposal for this purpose.

There is another reason why a scheme of this sort cannot, as it seems to me, be regarded as in effect merely a special method of arranging or laying out the churchyard so as to give convenient access to the church. It is the duty of the ecclesiastical authorities to see that a churchyard is properly fenced and its boundaries maintained (Canon 85).[27] But how can that obligation be fulfilled if the Court by faculty so alters the boundaries as to leave a portion of the churchyard outside, and physically indistinguishable from the rest of the highway?

I now turn to the authorities, of which there are several, and, with the exception of some recent cases in the Consistory Court of London, which I will refer to later, they are clear and all one way. They seem to me to establish two propositions: —

> (1.) That a portion of a churchyard may not legally be used either for enlargement of a highway or for any other secular purpose.
>
> (2.) That the Ecclesiastical Courts have no jurisdiction to authorize such a user of consecrated ground, and therefore any faculty purporting to confer such authority on any person is bad. It is not a matter of discretion which one Court may properly exercise in a given direction at a particular time, and another Court may properly exercise in an opposite direction at another time. It is not a question of discretion at all, but a question of jurisdiction.

The first case which it is material to quote is *The Rector of St.* [237] *George's Hanover Square v. Steuart in 1740*.[28] The case is very briefly reported; but it appears that, a faculty having been applied for to allow the erection of a "charity school" on the churchyard, a prohibition was granted on the ground that the Ecclesiastical Courts could not grant such a faculty.

In *The Rector and Churchwardens of St, John's, Walbrook v. The Parishioners thereof and Others* (1852)[29], the application was for a faculty to permit part of the burial

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27 (1) Canon 85 of 1603 provides as follows : "The church wardens or questmen shall take care and provide that the churches be well and sufficiently repaired. . . . The like care they shall take, that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges unto whom by law the same appertained : . . ."

28 (1) 2 Str. 1126.

29 (2) 2 Roberts. 515

ground to be thrown into the highway. Dr. Lushington, as judge of the Consistory Court of London, on motion for citation, said:

> " I well remember that an application was made to Sir William Wynne, when judge of the Arches Court, to grant a faculty for converting a part of the churchyard at Ewell, in Surrey, into the public road requiring to be widened; and that learned judge refused the motion, stating that nothing short of an Act of Parliament could enable him to accede to the prayer. That dictum has been to my knowledge since acted upon, and I consider rightly, in several instances in the dioceses of London and Rochester; I must, therefore, refuse the present motion."

In *Campbell v. The Parishioners of Paddington* in 1852[30] the same learned judge, while allowing a vestry to be built on a churchyard on the ground that

> "a vestry-room is employed for ecclesiastical as well as secular uses,"

laid down the law as follows:

> "When ground is once consecrated, no judge has power to grant a faculty to sanction the use of such ground for secular purposes."

There are several cases authorizing the erection in a consecrated churchyard of schools for religious teaching: *In re Bettison* (1874);[31] and of a mortuary as a temporary resting-place for the dead: *Hansard v. The Parishioners of St. Matthew, Bethnal Green* (1878)[32]; *The Vicar and Churchwardens of St. George's, Hanover Square v. Hall.*[33] In all these cases the faculties were granted, because the purposes were not, in the opinion of the Court, secular. Indeed, in *Hansard's Case*[34], the learned judge, Dr. Tristram, after stating that the appropriation of consecrated [238] ground for secular purposes is illegal, refused to grant a faculty for certain of the purposes desired, on the ground that, such uses being secular uses, he had no jurisdiction.

In *Harper v. Forbes*[35], in the Court of Arches in 1859, churchwardens were proceeded against for having, with the approval of the vicar, the rural dean, and the bishop personally, permitted a portion of the churchyard to be separated from the remainder of it and to be taken into a public road. Dr. Lushington at the outset of the hearing asked

30 (3) 2 Roberts. 558
31 (4) L. R. 4 A. & E. 294.
32 (5) 4 P. D. 46.
33 (6) 5 P. D. 42.
34 (5) See f/n 30
35 (1) 5 Jur. (N.S.) 275.

> "whether it would be contended that he had authority to set apart consecrated ground for secular uses, or whether it was proposed to apply to him for a faculty to confirm what had been done. . . ."

Counsel for the defendants replied in the negative; and then Dr. Lushington continued as follows:

> "I may therefore at once declare what I believe to be undoubted law, that it is not in the power of any Ecclesiastical Court whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation. From the earliest period that I have been acquainted with these Courts I have heard the law so laid down. It is singular that from a neighbouring parish to Reigate, namely, Ewell, an application was made to Sir W. Wynne, when Dean of the Arches, to grant a faculty for converting a part of the churchyard into a public road requiring to be widened, and he refused. Applications have several times been made to me sitting in the Consistory Court of London to permit minute portions of churchyards to be appropriated to secular uses; but I have always refused, because if I had allowed small portions of consecrated ground to be so used, I could not have rejected applications extending to the whole. In fact, it would be leaving the matter to the discretion of the judge, which would be contrary to law."

Nothing can be more emphatic than this very learned judge's statement of the law, not only that the Court ought not, but that it cannot grant such a faculty. So far as I am aware, there is no later reported judgment or dictum of Dr. Lushington which in any way qualifies his opinion expressed in the cases I have cited.
[239]
Lastly, in *Reg. v. Twiss* in 1869,[36] which was an application for a prohibition to stop a faculty to erect a workhouse and chapel on a consecrated burial ground, the prohibition was refused because it was not clear that the faculty would authorize more than the erection of the chapel, which of course was no desecration, and also because the applicant for prohibition was a stranger with no interest in the parish. But Chief Justice Cockburn expressed a very clear opinion on the point under discussion as follows: —

> "At the same time I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character; and the cases before that learned judge and the case of *St. George's, Hanover Square*[37] are quite sufficient to affirm that as a general proposition."

36 (1) L. R. 4 Q. B. 407.
37 (2) 2 Str. 1126.

I confess these authorities seem to me to establish that an application such as is before me to-day is outside my jurisdiction. And I should not have thought it necessary to go into the question so fully if it were not for three or four cases decided in the Consistory Court of London by the present Chancellor, Dr. Tristram, which seem to be inconsistent with the other authorities. The first is a case which, although decided in 1873, has, I think, only recently been published in a volume of Dr. Tristram's judgments: *The Vicar, &c., of St. Mary Abbots v. Parishioners, &c.* in 1873.[38] In that case, which was unopposed, a faculty was granted allowing a strip of the churchyard to be used outside the wall of the churchyard as a public footpath so long as it was required for that purpose. Some stress was laid on the increased convenience to persons attending church. The question of jurisdiction does not seem to have been fully discussed; but a then recent faculty was mentioned by the judge, by which part of St. Mary-le-Strand churchyard was allowed to be used as a highway. This last-mentioned case is, I believe, [240] unreported, and was, I suppose, unopposed, and probably unargued.

But in a much more recent case. *The Vicar and Churchwardens of St. Botolph v. The Parishioners of the Same*,[39] the same learned judge authorized the appropriation of a portion of a churchyard for widening a street. The faculty was opposed by a parishioner in person, and the learned judge delivered a considered judgment, in which he explained that although it had been contrary to the decisions of the Ecclesiastical Courts to sanction the curtailment of a churchyard used for burials "for the purpose of widening a public thoroughfare," he had many years before, at the instance of the then Bishop of London and some of the London vestries, reconsidered the matter, with the result that, in order to save the expense of obtaining special Acts of Parliament and to meet the needs of the day, it had become his practice to grant such faculties. Dr. Tristram states his view of the matter thus: —

> "The principle upon which the Court holds that it has jurisdiction to grant such faculties is that there is a discretionary power vested in it as to making orders relating to churchyards; and that it is the duty of the Court to exercise this discretion reasonably, and, as Sir John Nicholl observes,[40] 'to vary the exercise of it according to the change of times and circumstances, and that during the last twenty-five years there has been such a change of circumstances, owing to the great increase of traffic in the City and in other frequented parts of the metropolis, as to warrant the Court in granting such

38 (3) Tristram's Reports, p. 17.

39 (1) [1892] P, 161.

40 It is not clear where this observation ends as there is no closing the quotation mark. I suggest is should read - 'to vary the exercise of it according to the change of times and circumstances,'. Sir John Nicholl b. 16 Mar 1759. Deaths Sep 1838 [d. 26 Aug] Nicholl John (Right Honble) Bridgend 26 p210 . Educated at Cowbridge and Bristol Grammar Schools, St John's College, Oxford. Bachelor of Civil Law in 1780 and as Doctor of Civil Law in 1785. Called to the bar of the Doctors' Commons in 1785. King's Advocate Nov 1798. Sometime MP for Penryn, Hastings & Great Bedwyn. Dean of the Arches 1809. Vicar-general to the Archbishop of Canterbury's court in 1834.1833 Judge High Court of Admiralty till death. See Oxford D N B. - ECG

> faculties for the convenience of those who attend church as well as for that of the general public."

The difficulty which I have in following Dr. Tristram's judgment — and I need not say I feel great hesitation and reluctance in not following it — is that the matter does not seem to me a matter of discretion, but of jurisdiction. I do not understand how change of circumstances can give this Court a jurisdiction which, twenty-five years ago, in the opinion of Chief Justice Cockburn and Dr. Lushington, it did not possess.

The third case is *In re St. Nicolas Cole Abbey*,[41] in which the [241] same learned judge, Dr. Tristram, went further, and allowed an electric lighting company to construct underground chambers for the purposes of their commercial undertaking in a City churchyard, and for the purpose of such construction to remove a considerable quantity of human remains. The company paid for the accommodation. The case is important as shewing the tendency of this new practice to develop. The learned judge in this, as in the preceding case, founds himself on a dictum of Sir John Nicholl,

> "that faculties are to be granted at the discretion of the ordinary."[42]

That is a very important principle, which I do not, and of course cannot, question; but discretion must be exercised within the limits of the Court's jurisdiction, and I can only repeat that the difficulty here is to see the Court's jurisdiction.

I have carefully considered these recent decisions; but I confess I am unable to reconcile them with the earlier cases, some of which, at any rate, are decisions of the Court of Arches and binding upon me. No faculty of the kind now asked has ever been granted in this Court by me, or, so far as I know, by my learned predecessor. Dr. Robertson. Under these circumstances I must refuse to issue citation in this case.

Proctor for petitioners: Moore.

Judgment reported by C. F. JEMMETT[43]

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41 (2) [1893] P. 58.

42 (1) See Butt v. Jones 2 Hagg. Eccl. 424.

43 Charles Fuhr Jemmett. B.C.L., M.A. Christ Church, Oxon, LL.M., Trin. Coll., Camb,, 1872, B.A., LL,B. 1867, a member of the North-eastern circuit, a student of Lincoln's Inn 17 Nov 1865, called to the bar 30 Apr 1869 (eldest son of Charles Edward Jemmett, late of Surbiton, Surrey, gent., dec.) Births Sep 1844 [b. 20 Mar Ch. 23 May] Jemmett Charles Henley 16 p79. Deaths Sep 1922 Jemmett Charles F Age 78 Marylebone 1a p436.
JEMMETT Charles Fuhr of 7 King's Bench Walk Temple London died 7. August 1922 at 22 Bentinck Street Middlesex Probate London 2 November to the reverend John Francis Jemmett clerk and Ernest James Wythes gentleman. Effects £38,270 75. 8d. - ECG

Appendix 1

(F/n 4) [IN THE CONSISTORY COURT OF CHICHESTER.]

THE VICAR AND CHURCHWARDENS OF ST. ANDREW'S, HOVE, AND THE HOVE COMMISSIONERS *v.* MAWN AND ROWE AND OTHERS CITED.

This was a cause of faculty instituted on the promotion of the Rev. Thomas Pearcy,[44] the vicar, and E. J. Heathcote[45] and A. F. Bond,[46] the churchwardens of the church of St. Andrew's, Hove, in the diocese of Chichester, and the Hove Commissioners, for the purpose of obtaining a faculty to permit the carrying out a proposed widening of Church Road, Hove, over a portion of the churchyard of St. Andrew's, Hove, aforesaid, and the removal of remains necessitated by such alteration in the said churchyard.

The petition contained averments to the effect that Church Road, Hove, was much in need of being widened and improved, and much inconvenience and some danger was assured by reason of a contracted portion thereof, at a point where St. Andrew's churchyard projected into the direct line of traffic; that in order to widen the road as proposed, it would be necessary to interfere with a part of the churchyard to the depth of thirty and forty feet throughout its whole length; that in the portion of the churchyard which would be required there were 317 graves, varying in date from 1731 to 1891, but that by the works to be done under the faculty prayed for it was only intended to remove and rebuild the existing south wall of the churchyard, to remove and re-erect within the new boundary wall any existing memorial stones disturbed, and to remove the surface mould to the depth of twelve inches only, hardening the surface with chalk and road metal, without disturbing any graves or former burials; that by an Order of Council of May 22, 1883, burials in the churchyard were prohibited, with some few exceptions in favour of relatives of those already interred therein; and that if the proposed works were carried out the Hove Commissioners would pay £2,000 to trustees as a further endowment to St. Andrew's, Hove.

1894. Nov. 7. The cause was now heard on oral evidence before the Chancellor of the Diocese of Chichester, {Dr. Tristram, Q.C.}, sitting in the church of St. Andrew's, Hove.

44 Thomas PEACEY M A the Vicarage Wilbury Road Births Dec 1846 [b. 16 Sep] Peacy Thomas Bermondsey 4 p22 Deaths Jun 1909 [d. 1 Apr] PEACEY Thomas Age 62 Steyning 2b p156. M. Ellen Maria Connolly [Ireland]. - ECG

45 Untraceable. - ECG

46 This *may* be Maj Gen Adolphus Frederick Bond [Ventnor Villas, Church Road 1891]. Deaths Mar 1896 [d. 20 Jan] Bond Adolphus Frederick Age 85 Steyning 2b p193. Estate £9,025 19s 4d.- ECG

Boxall, on behalf of the petitioners, referred to The Vicar and Churchwardens of St. Botolph v. The Parishioners of the Same ([1892] P. 161).

Miss H. A. Mawn,[47] a parishioner interested in a brick grave proposed to be interfered with under the faculty, and other parishioners interested in similar graves, appeared by their solicitors in opposition to the grant of the faculty, and relied on Harper v. Forbes,[48] Reg. v. Twiss,[49] and Cripps on the *Law of Church and Clergy*, p. 438, and the cases there cited, as authorities that the Court had no jurisdiction to appropriate consecrated ground to the widening of a public highway.

Miss Rowe,[50] another opponent, appeared in person.

The result of the evidence and of the inspection of the churchyard by the Court appears from the judgment.

DR. TRISTRAM. The petitioners for this faculty are the vicar and church-wardens of the parish of Hove, who have been authorized by a vote of the parish vestry to make the present application. The Hove Commissioners have joined in the petition, and are prepared out of the rates to bear the whole expense occasioned by the proposed alterations, and to contribute a sum of £2,000 towards the endowment of the vicarage, if the faculty is granted.

The grounds upon which they ask that the faculty shall be granted is that the part of Church Road which abuts on the churchyard has become one of the principal thoroughfares in Hove, and that, owing to the increase of traffic along it and to the narrowness of this part of the road, it is essential for the safety of the public passing along it, as well as for that of the parishioners in going to and from their parish church, that the proposed alteration should be made.

The churchyard was closed for burials by an Order in Council issued some years ago, except as regards members of certain families buried there. Evidence of the necessity and urgency of the proposed alteration has been given by eight

47 Deaths Sep 1897 Mawn Harriette Anne Age 76 Steyning 2b17 p9 [Ch. 28 Nov 1819]
MAWN Harriette Anne of 29 Hood-villas Hove Sussex spinster died 27 August 1897 Probate London 15 December to Marian Rowe spinster Effects £2,323 6s. 2d. - ECG
48 (5 Jar. (N.S.) 275)
49 (L. R. 4 Q. B. 407)
50 Deaths Dec 1904 ROWE Marian Age 72 Steyning 2b p181
ROWE Marian of 29 Hove-villas Hove Sussex spinster died 16 December 1904 Probate Lewes 6 February to the reverend Granville Rowe Bailey clerk Effects £2,299 8s. 6d. - ECG

witnesses. In their evidence the witnesses on this part of the case one and all agree that the sudden narrowness of that part of Church Road which abuts on the churchyard is a source of difficulty and danger to persons walking or driving along it; that the narrowness of the angles at the east and west corners are most dangerous, especially the one at the west corner, and that in consequence thereof serious accidents have already happened. Mr. Bartlett, a parishioner of sixty years' standing, stated, that he had seen a horse and van forced into a cottage door opposite the west corner, and a lady knocked down there. The evidence goes to shew that the proposed alteration is most urgent for the safety of the traffic, and that the only way of securing that safety is by the granting of the faculty asked for. It also appears that this alteration is necessary for the safety of parishioners going to and from their parish church, as the only entrance to it is from this part of the road. The result of my inspection of the road and neighbourhood is confirmatory of the correctness of this evidence, which has been left uncontradicted by those who are opposing the faculty. The questions of law which arise in this and similar cases are two;

> First, whether in the case of a churchyard closed for burials an Ecclesiastical Court has a discretionary power to make any order of the kind asked for; and,
>
> secondly, whether, if the Court has such power, the making of the order upon the facts proved would be a discreet exercise of it.

As to the first question, the Court would observe, that this churchyard was separated and set apart by a sentence pronounced by the bishop for the burial of the dead for all time to come, but that under the Order in Council closing it for burials it is prohibited from being used generally for this purpose. The Court would also observe, that the effect of such a sentence was to place it under the exclusive jurisdiction of the Ecclesiastical Courts, and to vest in those Courts a discretionary power to make such orders respecting it as circumstances might from time to time require.

Thus, it is competent for an Ecclesiastical Court, when the circumstances of a parish require a church to be enlarged, a new vestry to be erected, or a footpath to be made in a churchyard to facilitate access to the church, or through the churchyard for general convenience, to give to any of these objects by faculty, and to order the removal of remains, under proper sanitary precautions, from the required site to another part of the churchyard.

In the exercise of this discretionary jurisdiction, Sir Robert Phillimore,[51] in the Arches, authorized the erection of a church school on an unused portion of a closed churchyard, thereby reversing a judgment delivered by Dr. Robertson, as Chancellor of Rochester, who held that he was precluded on the authority of the cases cited from granting the faculty: In re Bettison,[52] the principle to be observed by ecclesiastical judges in granting such faculties is thus laid down by Sir John Nicholl in the Arches :

> "Faculties are to be granted at the discretion of the ordinary, but it must be a sound discretion having a due regard to times and circumstances, and to the rights and interests of all parties concerned; if an unsound discretion be exercised, the party may appeal to a superior tribunal"[53]

There is no statute or ecclesiastical canon that places any limit on the exercise of this discretionary jurisdiction. There are decisions by which appellate judges have refused to sanction its exercise in certain cases, under certain circumstances, and in some of these decisions there are to be found obiter dicta apparently limiting its exercise in cases not then before the Court of Appeal.

From the cases it is clear that there are some dealings with a churchyard which an Ecclesiastical Court would not be justified in authorizing, such as the erection on it of a shop, or a dwelling-house intended to be let for profit; and Sir William Wynne and Dr. Lushington in the Arches refused to sanction portions of a country churchyard being thrown into a highway: see Harper v. Forbes[54] , adding that such appropriation could only be effected by statute.

It is, however, to be observed that in these cases the churchyards were not closed, but in actual use for burials, that they were situated in the country, that there was no reason shewn why the road should not have been widened by the appropriation of unconsecrated ground taken from the opposite side of it, and that it did not appear that the enlargement of the highway was necessary for the safety of persons resorting to the church, or for that of the general public passing along it. Moreover, at the date of these decisions the cost of enlarging churchyards was thrown upon the church-rates, and there would be objections to this additional burden being imposed upon the church-rates by the granting of such a faculty.

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51 Sir Robert Joseph Phillimore, 1st Baronet b. 5 Nov 1810 – 4 February 1885 Deaths Mar 1885 [d. 4 Feb]) Phillimore Robert Joseph Age 74 Henley 3a p480. Estate £9,552 0s 2d. See Oxford B M D. - ECG

52 (Law Rep. 4 A. & E. 294)

53 (Butt v. Jones (2 Hagg. Ecc. 424).

54 (5 Jur. (N.S.) 275)

Under such circumstances these learned judges might well conclude that the alteration they were asked to sanction was outside their discretionary power; but as the present case differs from those cases in most material circumstances, I am of opinion that the expressions referred to in these decisions are not in point.

The obiter dicta relied on are open to the further observation, that whilst an Appellate Court may hold that, under the circumstances of the case under appeal, the discretionary power has been wrongly exercised by the Court of First Instance, it is not competent to it by an obiter dictum to limit the discretion of Courts of First Instance in cases where the facts are different.

Faculties authorizing strips of closed churchyards to be used in cases of necessity as part of a public road have now been repeatedly decreed in the Consistory Court of London for the last twenty-five years, with a view of facilitating and avoiding danger in the traffic in crowded parts of the City and elsewhere.

The first faculty of the kind in the case of St. Mary-le-Strand was issued in the Consistory Court of London by my learned predecessor, Sir Travers Twiss.[55] The case is not reported; but on a similar application being made to me in 1873 in the same Court, in the case of St. Mary Abbotts, Kensington, I ascertained from Sir Travers Twiss that the faculty in the former case had been decreed by him with the approval of the late Bishop of London, and after deliberation, he being of opinion that the considerations which had influenced the judges in the cases cited were inapplicable to churchyards that had been closed for burials, when the alterations were requisite for the public safety and could not be otherwise practically obtained — I accordingly decreed a faculty in that case, and my reasons for so doing are reported in my volume of Consistory judgments, p. 17.

They are more fully reported in the case of The Vicar and Churchwardens of St. Botolph, Aldgate v. The Parishioners,[56] cited by Mr. Boxall.

These precedents have been generally followed by the chancellors of other dioceses with some few exceptions. My learned predecessor in this Court, Chancellor Wintle,[57] influenced by the expressions I have referred to in the

55 Sir Travers Twiss QC FRS b. 19 March. Deaths Mar 1897 [d. 14 Jan] Twiss Travers Age 88 Fulham 1a p185 See Oxford D N B. Pursued by Alexander Chaffers. - ECG

56 ([1892]P. 161)

57 Wintle, Robert Wintle, M.A., fellow St. John's Coll., Oxon, 1850, from Eton. Chancellor of the diocese of Chichester, J,P, Berks, assumed the surname of Wintle in lieu of his patronymic 1851, a student of Lincoln's Inn 22 Jan., 1848,, called to the bar 30 Jan., 1851 (eldest son of Ashhurst Turner Gilbert, lord bishop of Chichester); born

cases in the Arches, refused a similar application in the case of a closed burial ground in the parish of St. Mary-in-the-Castle, Hastings. In August last the vicar and churchwardens of the same parish, in conjunction with the mayor and corporation of Hastings, renewed an application before me for such a faculty on evidence that since the refusal a lamp-post at the corner of the burial ground had been knocked down three times by vans, and owing to the dangers of the road in consequence of its narrowness many of the parishioners were being prevented from attending evening service at their parish church, and that a man, who was carried into Court, had recently met with a most serious accident on the spot. Upon this evidence I decreed the faculty.

Faculties of this description having been granted during the last twenty-five years by the Consistory Court of London without appeal, the practice of the Court is to adhere to such precedents until they have been reversed on appeal. It is my duty, therefore, to adhere to this practice in London; and in other dioceses of which I am Chancellor until it has been overruled by a superior Court.

The second question for the consideration of the Court in this case is, whether upon the evidence before it, the granting of the faculty asked for would be a discreet exercise of the discretionary power vested in it. I am of opinion that it would; and the Court therefore decrees the faculty as prayed subject to the provision that the remains to be removed shall be reverently reinterred in vacant parts of the churchyard, or, if the families interested prefer it, in the parish cemetery; that the families interested shall have liberty to superintend by themselves or their agents the removal of the remains, and of selecting the site of their reinterment; that Miss Mawn be at liberty to remove the remains of the members of her family to the churchyard of Leighton in Shropshire,[58] and that the families have the same right of interment in the new brick graves as was reserved to them in their present graves by the Order in Council. Mr. Prince,[59] who has appeared as solicitor for several families interested in graves to be disturbed, will be entitled to his costs from the petitioners.

1825; married 1850, Emma, dau. of Ven. Henry Cotton, late archdeacon of Cashel. Deaths Sep 1892 [d. 8 Aug] Wintle Robert Wintle [sic] Age 67 St. Geo. H. Sq. 1a p269. Estate: £9.923 12s 2d.
Address 21, Warwick Square, S.W.; 5, Stone Buildings, Lincoln's Inn, W.C.; Carlton Club, S.W.

58 Harriett's father died: Deaths Mar 1882 MAUN John Age 77 Bridgnorth 6a p435 Maun John. Personal Estate £1,233 11s 10d.
21 April. The Will with a Codicil of John Maun late of Danesford near Bridgnorth in the County of Salop Maltster who died 22 January 1882 at Danesford was proved at Shrewsbury by Robert Hazledine of the Old Steam Mill Wolverhampton in the County of Stafford Miller and George Langford of Bridgnorth Bank Cashier the Executors.
Her Mother MAY have died: Deaths Sep 1862 Mawn Matilda Steyning 2b p142 - ECG

59 Of Prince & Ayres, solicitors, 8 Middle street [1891] - ECG

Solicitor for petitioners : C. A.Woolley.[60]

Solicitors for opponents : Prince & Plumbridge.[61]

Appendix 2

From

THE ECCLESIASTICAL LAW OF THE CHURCH OF ENGLAND Vol 2 [1895]
by the late Sir Robert Phillimore, his son Sir Walter George Frank Phillimore,[62]
assisted by Charles Fuhr Jemmett

Sect. 5. — Churchyard (s).

It is clear that by the common law the rector has the freehold in the churchyard, qualified undoubtedly by the rights of the parishioners, but he may bring an action for trespass if his right be unjustly invaded.[63]

The Mortmain Act (15 Ric. 2, c. 5) was aimed at an invention for defeating the law against mortmain, by which: —

> "some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements which be adjoining to their churches, and of the same, by sufferance and assent of the tenants, have made churchyards, and by bulls of the bishop of Rome have dedicated and hallowed the same, and in them do make continually parochial burying without licence of the King and of the chief lords."

[1406]
By a constitution of Archbishop Winchelsea, the parishioners shall repair the fence of

60 Deaths Jun 1910 Woolley Charles Alfred Age 79 Brighton 2b p150 Estate £49,001 10s 7d - ECG

61 Deaths Jun 1902 Plumbridge Thomas Age 40 Brighton 2b p166
PLUMBRIDGE Thomas of 39 Compton-avenue Brighton, solicitor, died 23 May 1902 Probate Lewes 14 June to Esther Sophia Plumbridge widow William Henry Plumbridge professor-of-music and Louis Meaden solicitor Effects £18,152 1s. 11d. {Louis Meaden was a sometime co-partner with Plumbridge}. - ECG

62 Phillimore, Sir Walter George Frank, Bart., Q.C., D.C.L., sometime member of the Western circuit, chancellor of the diocese of Lincoln, official of the archdeaconry of Colchester, secretary to Rt. Hon. Sir Robert Phillirnore, judge of High Court of Admiralty 1867-80, student of Christ Church and sometime fellow of All Souls, Oxon, editor of Blunts' Book of Church Law, a student of the Middle Temple 21 Nov., 1865, called to the bar 17 Nov., 1868, Q.C. Dec., 1883 (only son of Rt. Hon. Sir Robert Joseph Phillimore, Bart, late justice of the High Court of Justice, dec.); Births Dec 1845 [b. 25 Nov Phillimore Walter George Frank St Geo Han Sq 1 p37; Marriages Sep 1870 [26 Jul] Lushington Agnes to Phillimore Walter George F St Geo Han Sq1a p671, eldest dau. of late Charles Manners Lushington, Esq., M.P.
Deaths Mar 1929 Phillimore Walter G F Age 53 [sic] Kensington 1a p321 Estate: £557,170
Address 86, Eaton Place, S.W.; 4, Paper Bldgs., Temple, E.C. - ECG

63 (t) Walter v. Mountague, 1 Curt, p. 260.

the churchyard at their own charge.[64]

And Lord Coke says, that the parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were or should have been, while they lived, the temple of the Holy Ghost.[65]

And if the churchyard be not decently inclosed, the church, which is God's house, cannot decently be kept, and therefore this the parishioners ought to do, by custom known and approved; and the conusance thereof belongs to the ecclesiastical court.[66]

But nevertheless, if the owners of lands adjoining to the churchyard, have used time out of mind to repair so much of the fence thereof, as adjoins to their ground; such custom is a good custom; and the churchwardens have an action against them at the common law for the same.[67]

By Can. 85 of 1603:—

> "....The church-wardens or questmen shall take care, and provide that the churches shall be well and sufficiently repaired The like care they shall take that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth . . . ."[68]

By the statute of *Circurmspectè agatis*, 13 Edw. 1, st. 4:—

> " Also if prelates do punish for leaving the church-yard unclosed, ... the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition". [69]

Nevertheless, if the churchwardens sue a person in the Court Christian, supposing by their libel, that he and all they whose estate he has in certain land next adjoining to the churchyard, have used time out of mind to repair all the fences of the churchyard which are next adjoining to the said land, a prohibition will lie; for this ought to be tried at the common law, inasmuch as this is to charge a temporal inheritance.[70]

A constitution of Stratford says: —

64 (u) Lind. p. 253
65 (x) 2 Inst. p. 489.
66 (y) ibid.
67 (z) 2 Roll. Abr. Prohibition p287 ; Gibs. p. 194.
68 (a) Vide supra, p. 722, for this canon in full. - see appendix 3 for p.722
69 (b) Vide supra, pp. 832, 834. - see appendix 3 for p.832, p834
70 (c) 2 Roll. Abr. Prohibition, p. 287 ; The King v. Reynell, 6 East, p. 315.

> "Seeing it is prohibited by the law both ecclesiastical and secular, for laymen to have power to dispose of things ecclesiastical; in order therefore that the scandal of such usurpation may be utterly abolished, whereby certain parishioners of the parishes within our province, not knowing the limits of their own power, or rather not regarding the same, have cut down, or rooted up the trees, or mowed the grass growing in the churchyards of the churches or chapels of our said province, against the will of the rectors or vicars of such [1407] churches or chapels, or others deputed by them for the custody or cure thereof, and have sacrilegiously applied the same to their own use, or to the use of the churches, or of other persons, at their will and pleasure; from whence peril of souls, contentions, and grievous scandals do arise betwixt the ministers of such churches and their parishioners: we do declare by the authority of the present council, that persons guilty of such contempt shall incur the sentence of the greater excommunication, until they shall make sufficient amends and satisfaction".[71]

Against the will of the Rectors or Vicars.] — This is, in churches where there is a rector only, or a vicar only. But if in the same church there be both rector and vicar, it may be doubted (says Lindwood) to whether of them the trees or grass shall belong. But I suppose (says he) they shall belong to the rector; unless in the endowment of the vicarage they shall be otherwise assigned.[72]

In Bellamy's case, in 13 Jac. 1, this point, unto which of the two the trees do belong, was considered but not determined:—

> where the vicar sued the parson impropriate in the spiritual court, for cutting them down; and the suit being for damages, and an action of trespass lying at common law, a prohibition was granted, and afterwards upon the same grounds a consultation denied; but what became of the main point, that is, to whom the trees of right belonged, appears not ; only Rolle seems to make the right turn upon this, that they did belong to him who is bound to repair; which determination agrees well with what is said in the statute here following, namely, that the parson shall not cut them down, but when the chancel wants reparation.[73]

Or to the Use of the Churches.] — That is, to the use of the fabric of the church; which it is not lawful to do, without the consent of the rector or vicar to whom they belong. And it is very reasonable, that neither rector nor vicar do fell such trees but for evident necessity of the reparation of the manse of the rectory, or of the chancel. But if the nave of the church want repairing, the rector or vicar will do well (says

71 (d) Lind. p. 267.
72 (e) ibid.
73 (f) 2 Roll. Abr. Parson, p. 337; Gibs. pp. 207, 208.

Lindwood) not to be difficult in granting leave to cut down one or two for that use.[74]

By 35 Edw. 1, st. 2, or the statute *Ne rector prosternat arbores in cæmiterio* :

> "Because we do understand, that controversies do ofttimes grow between parsons of churches and their parishioners, touching trees growing in the churchyard, both of them pretending that they do belong unto themselves: . . . We have thought it good, rather to decide this controversy by writing than by statute : . . . Forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the [1408] soil; it must needs follow : . . . That those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose, but as the Holy Scripture doth testify, the charge of them is committed only to priests to be disposed of. II. And yet seeing those trees be often planted to defend the force of the wind from hurting the church; we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparation: neither shall they be converted to any other use, except the body of the church doth need like repair : . . . In which the parsons of their charity shall do well to relieve the parishioners, with bestowing upon them the same trees; which we will not command to be done, but we will commend it when it is done."

Rather to decide this Controversy by Writing than by Statute.] — And therefore Lord Coke calls this law a treatise only, and adds that it is but a declaration of the common law.[75]

In *Hilliard v. Jefferson*, in 9 Will. 3, a parson was libelled against the defendant in the spiritual court of York, for having cut elms in the churchyard; and a prohibition was granted upon suggestion that they grew on his freehold.[76]

On this subject of waste and felling timber, the reader is referred to the previous Chapter on Waste and Dilapidations.[77]

Although the church and churchyard be the parson's and be through consecrated; yet a man may prescribe to have a way through the church or churchyard.[78]

No one can make a private door into the churchyard, without the consent of the minister whose freehold the churchyard is, and a faculty also for the same.

In *Pew v. The Churchwardens of St. Mary Rotherhithe,* in 8 Geo. 2, Pew was libelled

74 (g) Lind. p. 267.
75 (h) *Liford's Case*, 11 Co. p. 49 b; Gibs. p. 208.
76 (i) Ld. Raym. p. 212.
77 (k) Supra, Part V., Chap. V.
78 (l) 2 Roll. Abr. Prescription, p. 265. Vide infra, Sect. 8.

against in the spiritual court, for nuisance and encroachment on the churchyard: to which he pleaded that he was the owner of four tenements, which formerly stood on the ground in question, and that his present building was upon the old foundation, and did not project further. And this not being a matter properly triable there, a prohibition was granted. For though interrupting the use of a churchyard, as a churchyard, is properly cognizable in the ecclesiastical court; yet the bounds of it, which is matter of freehold, ought not to be determined there.[79]

The case of *Adlam v. Colthurst* should be mentioned here; it was on this wise — In a suit promoted by one parishioner against another for having, without lawful authority, caused human bones and portions of the soil to be removed from a churchyard to a field belonging to the defendant, the Court of Arches [1409] decreed that the defendant had offended against the laws ecclesiastical, and issued a monition to him to replace in the burial ground, before a certain day, the bones and earth so removed. The defendant failed to comply with the order, alleging that he was unable to do so by reason that the field in which the bones and earth had been placed was no longer in his occupation or possession : — It was holden, that his conduct amounted to contempt, and that unless he obeyed the monition within six days and certified his obedience, he should be pronounced in contempt, and his contempt signified.[80]

Where a portion of a churchyard is taken under the powers of an act of parliament incorporating the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the rector is entitled to the interest of the purchase-money, even though the burial ground had been previously closed so that he was in receipt of no fees from burials.[81] But where a churchyard is taken under similar powers, and the amount to be paid by the takers to the then incumbent is to be settled by arbitration, it has been holden that the arbitrator should not award to the incumbent an amount calculated upon the value that might be put upon the lands divested of their ecclesiastical position, but only so much as will compensate him for his actual loss.[82]

In *Ex parte The Vicar of St. Botolph Aldgate,*[83] funds representing the purchase money of part of a churchyard taken for street improvements, were applied by the court in the purchase, alteration, and repair of a house for a vicarage.

The lawfulness of building upon churchyards has been frequently a matter of judicial consideration. In the case of *The Rector of St. George's, Hanover Square v. Steuart*,[84] a prohibition was granted to restrain the Ecclesiastical Court from granting to Mr.

79 (m) 2 Stra p. 1013. Sed. Vide *Quilte's Case,* Carth. p151.
80 (n) L. R., 2 Adm. & Eccl. p. 30.
81 (o) *Ex parte Rector of Liverpool,* L. R., 11 Eq. p. 15; 19 W. R. p. 47 ; *Ex parte Rector of St. Martin's, Birmingham,* L. R., 11 Eq. p. 23.
82 (p) *Stebbing v. Metropolitan Board of Works*, L. R., 6 Q. B. p. 37. As to the right of a perpetual curate with respect to the churchyard, vide supra, p. 244.
83 (q) 3 Ch. 1894, p. 544.
84 (r) 2 Stra. p. 1126.

Steuart a faculty to erect a charity school in the churchyard, without the consent and against the will of the rector and parishioners.

But with the consent of the incumbent and the majority at any rate of the parishioners, faculties have been granted to build on churchyards — schools,[85] a vestry room,[86] and mortuaries, or places for the reception of dead bodies, until interment.[87]

But the effect of three acts of Parliament, which are now to [1410] be mentioned, is to prohibit all building upon any churchyard or cemetery which has been used for burial, unless such building be for the enlargement of the church.[88]

By the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3, it is not to:—

> "be lawful to erect any buildings upon any disused burial-ground, except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship."

By section 4, this provision is not to:—

> "apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

The words "disused burial ground" are defined by sect. 2 to mean:—

> "a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein, in pursuance of the provisions of "15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134.[89]

But this definition has been enlarged by the Open Spaces Act, 1887 (50 & 51 Vict. c. 32) ; s. 4 of which makes the term "disused burial ground" in the act last recited, as well as in the act itself, mean:—

> "any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council."

The same section prohibits as well temporary or moveable, as other buildings. Moreover, the same section gives to the term "burial ground" the same meaning as in

85 (s) Russell v. Parish of St. Botolph's, 5 Jur., N. S. p. 300; Re Bettison, L. R., 4 Adm. & Eccl. p. 294.

86 (t) Campbell y. Parishioners of Paddington, 2 Roberts, p. 558 ; 16 Jur. p. 646. See Reg. y. Twiss, L. R,, 4 Q. B. p. 407.

87 (u) Hansard v. Parishioners of Bethnal Green, 4 P. D. p. 46 ; Burial Board of St. George's, Hanover Square v. Hall, 5 P. D. p. 42.

88 (u) See *Re Pomford and Newport District School Board,* 1 Ch. 1894, p. 297.

89 (v) Vide supra, pp. 657 — 659.

the Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), s. 1,
as amended by the act 50 & 51 Vict. c. 32: that is to say, the term in question is to mean:—

> "any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment;"

the succeeding words,

> "and in which interments have taken place since the year 1800,"

being repealed by the schedule to 50 & 51 Vict, c. 32.

In *Re The Ecclesiastical Commissioners and The New City of London Brewery Co., Limited,*[90] the prohibitions contained in these acts were said not to apply to building on the site of churches pulled down under 23 & 24 Vict, c. 142.[91]

Disused or closed churchyards had been occasionally treated in such a fashion as to make them available to some extent for walks, and as open spaces in the metropolis and other cities. But the first reported case in which this was done under ecclesiastical authority is the case, *Re The Rector and Churchwardens of St. George's in the East*,[92] in which a faculty for laying out the churchyard as a garden for use and enjoyment by the public on certain terms, was granted by Dr. Tristram, Chancellor of the diocese of London.

A few years after this last-mentioned decision was passed the [1411] Metropolitan Open Spaces Act, 1881 (44 & 45 Vict. c. 34), 44 & 45 Vict, already referred to. This Act enacts as follows :—

> Sect. 4. " The owner of any churchyard, cemetery, or burial ground situate within the[93] metropolis, and closed for burials either under an order of Her Majesty the Queen in Council, or otherwise, may convey the soil of such churchyard, cemetery, or local burial ground, or grant any term of years or other limited interest therein to or enter into any agreement with the Metropolitan Board or the vestry or district board of the parish or district in which such churchyard, cemetery, or burial ground, or any part thereof, is situate for the purpose of giving the public access to the said churchyard, cemetery, or burial ground, and preserving the same as an open space accessible to the public, and under the control of such board or vestry, and for the purpose of improving and laying out the same."

90 (x) W. N. 1895, p. 52.
91 (y) Vide supra, p. 410.
92 (z) 1 P. D. p. 311.
93 (a) The word "owner" in this connection is defined by s. 1, as "the person or persons, corporation sole or body corporate, in whom the soil and freehold ... is vested whether as appurtenant or incident to any benefice, or cure of souls, or otherwise."

Sect. 5. "The Metropolitan Board[94] and the vestry or Powers and district board of the parish or district within which any open space, churchyard, cemetery, or burial ground, or any part thereof, is situate may, by agreement, and for valuable or nominal consideration by way of payment in gross or of rent, or otherwise, or without any consideration, take and hold the soil and freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over any open space, churchyard, cemetery, or burial ground, and may, with reference to any open space, churchyard, cemetery, or burial ground, undertake the entire or partial care, management, and control thereof, whether any interest in the soil is transferred to the board or vestry or not, and may for the purposes aforesaid enter into any agreement with the persons authorised by this Act to agree with reference to any open space, churchyard, cemetery, or burial ground or with any other persons interested therein.

"Any estate or interest in or control over any open space, churchyard, cemetery, or burial ground acquired by the Metropolitan Board,[95] or any vestry or district board under the provisions of this Act, shall be held and administered by such board or vestry in trust to allow, and with a view to, the enjoyment by the public of such open space, churchyard, cemetery, or burial ground in an open condition, free from buildings and under proper control and regulation, and for no other purpose, ... [96]and the board or vestry shall maintain and keep the same in a good and decent state, and may inclose or keep the same inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, seat, and [1412] otherwise improve the same, and do all such works and things, and employ such officers and servants, as may be requisite for the purposes aforesaid, or any of them."

"Provided that no board or vestry shall exercise any of the powers of management in this Act mentioned with reference to any consecrated ground, unless and until they are authorised so to do by the license or faculty in that behalf of the bishop of the diocese in which such consecrated ground is situate, which license or faculty may be granted by such bishop upon the application of the board or vestry, and may extend to the removal of any tombstone or monument, under such conditions and subject to such restrictions as to the bishop may seem fit."

By sect. 6. The local authority:—

"may, with reference to any open space, churchyard, cemetery, or burial ground in or over which it has acquired any estate, interest, or control under

94 (b) This now will be the London County Council.
95 See f/n. 33.
96 (c) The words here omitted are repealed by 50 & 51 Vict. c. 32, s. 2.

the provisions of this Act, make byelaws for the regulation thereof, and of the days and times of admission thereto, and the preservation of order and prevention of nuisances therein."

By sect. 7. Local authorities may jointly carry out the provisions of the Act.

Sect. 8. " Where any open space, churchyard, cemetery, or burial ground, by virtue of any Act of Parliament or otherwise, is extra-parochial, or forms part of some parish other than that which surrounds the same, the vestry or district board acting for the parish surrounding the same may carry out, or may enter into agreement with any one or more vestries or district boards acting for any other parishes, on such terms as may be arranged between them, and may jointly carry out the provisions of this Act, and shall have the same powers in every respect as if such open space, churchyard, cemetery, or burial ground were part of the parish or district of such vestry or district board."

Sect. 9. " No estate, interest, or right of a profitable or beneficial nature in, over, or affecting an open space, churchyard, cemetery, or burial ground shall, except with the consent of the body or person entitled thereto, be taken away or injuriously affected by anything done under this Act without compensation being made for the same "

By the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), already referred to, sect. 2, subsect. (2) :—

"The playing of any games or sports shall not be allowed in any churchyard, cemetery, or burial ground in or over which any estate, interest, or control is acquired under section five of the Metropolitan Open Spaces Act, 1881.

" Provided that—

(a) In the case of consecrated ground, the bishop, by any license or faculty granted under the Metropolitan Open Spaces Act or this Act, and

(b) In the case of any churchyard, cemetery, or burial ground which is not consecrated, the body from which any such estate, interest, or control as aforesaid is acquired [1413] may expressly sanction any such use of the ground, and may specify any conditions as to the extent or manner of such use."

Sect. 3. "In the case of any disused churchyard, cemetery, or burial ground, at least three months before any tombstone monument is moved, the following steps shall be taken:—

(a) A statement shall be prepared sufficiently describing by the name and date appearing thereon the tombstones and monuments standing or being in the ground, and such other particulars as may be necessary;

(b) Such statements shall be deposited with the clerk of the board or vestry, and shall be open to inspection by all persons;

(c) An advertisement of the intention to remove or change the position of such tombstones and monuments shall be inserted three times at least in some newspaper circulating in the neighbourhood of the burial ground, and such advertisement shall give notice of the deposit of such statement as is hereinbefore described, and of the hours within which the same may be inspected;

(d) A notice in terms similar to the advertisement shall be placed on the door of the church (if any) to which such churchyard, cemetery, or burial ground is attached, and shall be delivered or sent by post to any person known or believed by the board or vestry to be a near relative of any person whose death is recorded on any such tombstone or monument.

"In the case of any consecrated ground no application for a faculty shall be made until the expiration of one month at least after the appearance of the last of such advertisements as aforesaid.

"Provided that on any application for a faculty, nothing shall prevent the bishop from directing or sanctioning the removal of any tombstone or monument if he is of opinion that reasonable steps have been taken to bring the intention to effect such removal to the notice of some person having a family interest in such removal."

The care of closed churchyards is vested in the churchwardens by 18 & 19 Vict. c. 128, sect. 18.[97] By the same section the churchyards, costs are to be repaid by the overseers on the certificate of the churchwardens out of the poor rate. Now by the Local 56 & 57 Vict. Government Act, 1894 (56 & 57 Vict. c. 73), sect. 6, if the churchwardens now, since the passing of that act, give such a certificate, their powers, duties, and liabilities thenceforth vest in the parish council.

Paths across churchyards, so far as they are not public highways, fall under the jurisdiction of the ecclesiastical courts.
[1414]
In *Walter v. Mountague*,[98] it is said of such paths:—

"Individuals may by prescription have a right of way; and parishioners have

97 (d) Vide supra, p. 664, for this section in full, and the cases on its construction. - see appendix 3 for p.664
98 (e) 1 Curt. p. 261. See also Batten v. Gedye, 41 Ch. D. p. 507.

> the same right for attendance on divine worship, vestries, and other fit occasions..... I apprehend that neither the rector nor the churchwardens can make a new path without a faculty from this Court. In strictness that is by law required.
>
> With regard to the jurisdiction, the churchyard being consecrated ground, this Court has cognizance of the matter, and it is my duty to protect it against any unauthorized or illegal invasion whatsoever; and supposing the alterations were most convenient, still the Court would not sanction them, unless the consent of the rector had been previously given, or at least asked. If this is an ancient footpath, it is competent to any individual to proceed at law; and if the question were raised here this Court might be stopped by a prohibition."

In that case the Court condemned the churchwardens in £40 costs, *nomine expensarum*, monishing them to be more careful in future, and not considering it a good defence that the new footpath they had made through the churchyard was *bona fide* for the good of the parishioners.

By 59 Geo. 3, c. 134, s. 39,:—

> "It shall be lawful for the said commissioners" [now the Ecclesiastical Commissioners,[99] "if they should think fit, to alter, repair, pull down and rebuild, or order or direct to be altered, repaired, pulled down and rebuilt, the walls or fences of any existing churchyard or burial ground of any parish or chapelry, and to fence off', with walls or otherwise, any additional or new burial ground, to be set out or provided by virtue of this act; and also to stop up and discontinue, or alter or vary, or order to be stopped up and discontinued, or altered or varied, any entrance or gate leading into any churchyard or burial ground, and the paths, footways and passages into, through or over the same, as to them may appear useless and unnecessary, or as they shall think fit to alter or vary";

provided that the same be done

> "with the consent of any two justices of the peace of the county, city, town or place where any such entrance, gate, path or passage shall be stopped up or altered; and on notice being given in the manner and form prescribed by an act," 55 Geo. 3, c. 68.

Schedule A of that act (55 Geo. 3, c. 68) gives a form of notice of an order for stopping up an useless road, and the form states that such order will be enrolled at sessions, unless, upon an appeal against the same to be then made, it be otherwise

99 (f) At the passing of the act the Church Building Commissioners.

determined.

It has been holden that 59 Geo. 3, c. 134, though incorporating 55 Geo. 3, c. 68, did not give an appeal against the order of the commissioners; for an appeal cannot be given by implication, otherwise it would not have been taken away by the repeal of 55 Geo. 3, c. 68, by 5 & 6 Will. 4, c. 50, s. 11.[100]
[1415]
Under 59 Geo. 3, c. 134, it has been ruled, that the notice Notice required must be given before the making of the order by the be given by the commissioners.[101]

Questions have arisen as to the power of the ecclesiastical court to authorize the making of new public or private paths across churchyards, or the throwing of a portion of a churchyard into a street or roadway so as to widen it. Expressions are to be found in some older cases raising doubts as to whether this could lawfully be done[102]; and very recently the Chancellor of the diocese of Rochester[103] has held that the ecclesiastical court has no jurisdiction to issue a citation in such a case.[104] On the other hand it has been holden by the Chancellor of the diocese of London[105] that where the churchyard has been closed for burials, and the ecclesiastical jurisdiction is preserved and public convenience requires it, a faculty for such a purpose may be granted.[106] The editor, as Chancellor of the diocese of Lincoln, has felt himself at liberty to follow this last-mentioned precedent, and to grant a faculty for the purpose of widening a street, taking care that the ecclesiastical jurisdiction is asserted and the boundaries of the churchyard marked on the pavement. Similar faculties have also been granted in the dioceses of Worcester and Chichester.[107]

Appendix 3

P. 664
By 18 & 19 vict. c. 158, s, 18, " In every case in which any Order in Council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof; and the costs and expenses shall be repaid by the overseers, upon the certificate of the burial board or

100 (a) Reg. v. Stock, 8 A. & E. p. 405.
101 (h) Reg. v. Arkwright, 18 L. J., Q. B. p. 26.
102 (i) See Harper v. Forbes, 5 Jur., N. S. p. 275 ; Rector, &c. of St. John's, Walbrook v. Roberts, p. 515
103 (k) L. T. Dibdin, Esq.
104 (l) Re Plumstead Buried Ground, v. Cross, March 16, 1894, P. 1895.
105 (m) Dr. Tristram.
106 (n) Vicar of St. Botoiph v. Parishioners, P. 1892, p. 161.
107 (o) See *Re Plumstead Burial Ground*, P. 1895.

churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses."

Where the closed ground is a churchyard, the duty falls on the churchwardens; where it is a mere burial ground, the duty falls on the burial board. The act does not apply to private burial grounds.

P. 722
By Can. 85 of 1603, "The church-wardens or quest-men shall take care and provide that the churches be well and sufficiently repaired, and so from time to time kept and maintained, that the windows be well glazed and that the floors be kept paved, plain, and even, and all things there in such an orderly and decent sort, without dust, or anything that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect. The like care they shall take that the churchyards be well and sufficiently repaired, fenced and maintained with walls, rails, or pales, as hath been in each place accustomed, at their charges unto whom by law the same appertaineth: but especially they shall see that at every meeting of the congregation peace be well kept: and that all persons excommunicated and so denounced be kept out of the church."

P. 832
By 13 Edw. 1, st. 4, called the statute of Circumspectè agatis, it is enacted as follows: "The king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy; not punishing them if they hold plea in court Christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin; as fornication, adultery and such like; for the which sometimes corporeal penance, and sometimes pecuniary is enjoined, specially if a freeman be convict of such things. .... In all cases afore rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

P. 834
For by the statute of Circumspectè agatis, 13 Edw. 1, st. 4, just cited, "For breaking an oath, it hath been granted that it shall be tried in a spiritual court, when money is not demanded, but a thing done for the punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."